IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1271

ARCHIE L. WAINWRIGHT, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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OCTOBER TERM, 1971

No. _____

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v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, Archie L. Wainwright, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered herein on August 17, 1971.

Opinion Below

The opinion of the Court of Appeals, reported at 448 F. 2d 984, and the Court's order denying rehearing, appear in the Appendix. The opinion of the District Court for the District of Colorado was not reported.

Jurisdiction

The judgment of the Court of Appeals, affirming the trial court's denial of a 28 U.S.C. § 2255 motion to vacate judgment, was entered on August 17, 1971. A timely petition for rehearing was denied and Order entered on November 12, 1971. By Order of Mr. Justice White, dated January 21, 1972, the time for filing this petition for certiorari was extended to and including April 10, 1972. Jurisdiction is invoked pursuant to 28 U.S.C., § 1254 (1).

Questions Presented

1. In a criminal trial for willful attempted evasion of federal income taxes, does an instruction to the jury which imputes to the defendant, from the mere signing of the tax return, knowledge of the contents thereof (without which, willfulness could not be established), constitute a denial of due process and/or fair trial?

2. In a criminal trial for willful attempted evasion of federal income taxes, where an essential element of the crime charged is the specific intentional inaccurate reporting of taxable income, do any or all of the following, separately or collectively, constitute a denial of due process and/or fair trial:

(a) The Government's misrepresentation to the jury that only one error in defendant's reporting was found;

(b) The Government's failure to disclose other errors in defendant's reporting, which other errors the Government would subsequently assert as the basis for civil tax deficiencies and penalties; or

(c) The trial court's refusal to permit defense counsel to elicit testimony or produce documentary evidence relevant to (a) or (b)?

Constitutional and Statutory Provisions Involved Amendments to The United States Constitution

Article V

. . . nor be deprived of . . . liberty, or property, without due process of law;

Article VI

In all criminal prosecutions the accused shall enjoy the right to . . . trial by an impartial jury . . .; to be confronted with the witnesses against him; . . . and to have the assistance of counsel for his defense.

Internal Revenue Code of 1954, § 7201; 26 U.S.C. § 7201

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000.00, or imprisoned not more than five years, or both, together with the costs of prosecution.

Statement of The Case

On May 9, 1968, petitioner was found guilty by jury trial, pursuant to Section 7201 of the Internal Revenue Code of 1954, of willfully attempting to evade federal income taxes for the years 1961, 1962 and 1963. His convic-

tion was affirmed by the Court of Appeals for the Tenth Circuit in *United States v. Wainwright,* 413 F. 2d 796 (10th Cir. 1969); *cert. denied,* 396 U.S. 1009 (1970).

While incarcerated, petitioner timely filed a "Motion to Vacate Judgment Under Section 2255, Title 28, U.S.C." and "Supplement to Motion to Vacate Judgment Under Section 2255, Title 28, U.S.C." Following the trial court's hearing thereon, the motion and supplement thereto were denied (Order dated July 6, 1970, entered July 7, 1970). Timely appeal was taken to the Court of Appeals for the Tenth Circuit, which upheld the District Court. *Wainwright v. United States,* 448 F. 2d 984 (10th Cir. 1971).

For purposes of this petition, issue is taken, first, with that portion of the Court of Appeals' decision and opinion pertaining to the jury instruction. At the close of evidence, the trial court had instructed the jury (App., P. 4):

> Now, whenever the facts appear beyond a reasonable doubt from the evidence in the case that the accused had signed his tax return, a jury may draw the inference and find that the accused had knowledge of the contents of the return.

The Court of Appeals specifically found that the instruction was proper.

Secondly, issue is taken with (a) misrepresentations in the Government's presentation of its case; (b) the Government's failure to disclose facts bearing directly on the question of the requisite specific criminal intent; and (c) the trial court's refusal to permit the taking of testimony or production of evidence aimed at correcting the misrepresentations and eliciting the crucial missing facts.

The Government's key witness was Internal Revenue Agent Glenn M. Smith. Through him the misrepresentation was made that, as to each of the conviction years, only one error (failure to report "purchase rebates") was found in defendant's reporting which affected his taxable income. The Agent testified (App., P. 3):

> Q. In summary then, Mr. Smith, for these three years the only adjustment that you made in Mr. Wainwright's tax returns which would increase his income were the adjustments of the result of the rebate discounts paid to him by the oil companies, is that correct.
>
> A. Yes.

In point of fact, several errors in reporting were discovered in each of those years, and are now being used as the basis for civil tax deficiencies and penalties. The trial court refused defense counsel's repeated attempts to elicit testimony pertaining to those errors. The Court of Appeals affirmed. (App., pp. 2, 3 and 4).

In his closing argument, the Assistant United States Attorney referred to the considerable volume of petitioner's business, and made several references to the accuracy, notwithstanding that volume, of petitioner's records. Only the failure to report the "purchase rebates" was singled out. None of the other errors, forming a basis of civil liability, was mentioned.

Reasons For Granting The Writ

1. *The Jury Instruction.*

(a) The decision below is in real conlfict with the Seventh Circuit as to the characterization and effect of the instruction.

The Court of Appeals upheld the validity of the instruction (App., p. 4):

> A challenge to this instruction was rejected on direct appeal but appellant now calls to our attention a decision of the Seventh Circuit, United States v. Bass, 425 F. 2d 161, which apparently interprets the instruction as creating a conclusive presumption contrary to constitutional safeguards pertaining to burden of proof. We must simply reiterate that we believe the instruction in this case to have been properly given and violative of no constitutional provision. *See* United States v. Wainwright, supra, at 801-02.

In doing so, it acknowledged the conflict between its position and that of the Seventh Circuit in *United States v. Bass*, 425 F. 2d 161 (7th Cir. 1970). In *Bass*, a matter likewise involving a conviction for willful attempted evasion of income tax, the trial court had instructed the jury.

> Whenever the fact appears beyond a reasonable doubt from the evidence in the case that the defendant signed his tax return, you may draw the inference and find that the defendant had knowledge of the contents of such return.

The two instructions, that of the trial court herein and that of the trial court in *Bass*, are, for all operative purposes, identical. They are, in fact, nearly verbatim and appear to have been drawn from a prior edition of 2 Devitt and Blackmar, *Federal Jury Practice and Instructions* § 52.14 (2d Ed. 1970). Nonetheless, in diametrical opposition to the position of the Tenth Circuit, the Seventh Circuit had held, at page 163:

> . . . We do not hold that a taxpayer can sign a false return and escape liability by disclaiming actual

> knowledge of the contents. [Citation omitted] Rather, we conclude that it is improper to charge a taxpayer with conclusive knowledge of the contents on the basis of the signature alone. Knowledge may be inferred from the facts and circumstances of the case and certainly the signature at the bottom of the return is *prima facie* evidence that the signor knows the contents thereof. [Citation omitted] The court's instruction created a conclusive presumption and it was in error.

It should be noted that *Bass* was decided subsequent to this Court's denial of certiorari in *United States v. Wainwright, supra.*

(b) The decision below raises significant issues of fifth amendment due process and sixth amendment right to fair trial, recurring in the context of other criminal tax evasion prosecutions.

Section 7201 of the Internal Revenue Code of 1954, as amended, *supra,* has been called:

> . . . [T]he capstone of a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency.[1]

Accordingly, its utilization should be accompanied by only the highest standard of due process and fair play.

The crime which Section 7201 defines exists only when there are: (1) a substantial deficiency in tax, (2)

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[1] *Sansone* v. *United States,* 380 U.S. 343, 350-351 (1965), citing *Spies v. United States,* 317 U.S. 492, 497; (1943).

an affirmative act constituting an evasion or attempted evasion, and (3) willfulness (intent to defraud or evade; evil motive and bad purpose). *Sansone v. United States, supra,* p. 351. The crime cannot exist absent willfulness; willfulness cannot exist absent knowledge. To the extent, then, that knowledge is not established beyond a reasonable doubt, no conviction can result.

Yet the trial court instruction imputed knowledge (and thus willfulness), an essential element of the crime, from the mere signing of a tax return. It thereby obviated the necessity for the Government's meeting of its burden of proof beyond a reasonable doubt.

Moreover, the finder of fact was preempted from making an impartial factual finding as to the essential element of specific intent. It was deprived of the full latitude within which, under all traditional and fundamental concepts of due process and fair trial, it must be afforded freedom of operation.

Overlooking the principle that the standard of burden of proof, due process and fair play to be employed in a Section 7201 prosecution ought to be consonant with its "capstone" character, and thus of the highest order, the issue here involved is susceptible of resolution through implementation of a minimal standard. Moreover, its resolution is crucial, not only to the petitioner, but to all taxpayers who are now, or who may subsequently be, subjected to criminal tax prosecution.

(c) The decision below raises the same fundamental issues in the context of the prosecution for any crime, one essential element of which is willfulness and another the knowledgeable execution of a document.

The impact of the decision below is not confined to criminal tax prosecutions. The instruction in question is potentially controlling of the prosecution of any crime, one essential element of which is willfulness and another the knowledgeable signing of a document. In any such prosecution, the questions of knowledge and willfulness (and the standard of due process, burden of proof and fair trial to be borne in connection therewith) are controlling.

The ramifications of the issues raised by the first question presented, therefore, extend far beyond the immediate interests of the petitioner. They touch upon concepts of fundamental due process and fair play, potentially not only affecting, but controlling, the outcome of myriad criminal prosecutions.

(d) The decision below conflicts, in principle, with *In Re Winship.*

In *In Re Winship*, 397 U.S. 358 (1970), this Court established, as a generally applicable rule of law, the basic constitutional character and stature of the burden of proof in all criminal cases. In turning its decision upon that principle, the Court pronounced, at page 364, that:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

The instruction here involved, with its imputation of knowledge (and thus willfulness) from the mere signing of the tax return, is antithetical to this principle. Not only

does it prescribe a degree of proof less than that of a reasonable doubt, it destroys the impartial fact-finding function of the jury demanded by the sixth amendment to the Constitution.

2. *Government Misrepresentation to Jury.*

(a) The decision below conflicts, in principle, with *Giglio v. United States.*

Early this year, this Court rendered its decision in *Giglio v. United States,* 40 U.S. L. Week 4209 (U.S. Feb. 22, 1972). Therein a litany of the Court's authority is cited for the principle that the prosecution must forthrightly disclose and present to the jury all material evidence. There is reversible error whenever the failure to do so, ". . . in any reasonable likelihood [could] have affected the judgment of the jury. . . ."

In the case at hand the Government's misrepresentation that, as to each of the conviction years, only one error was found in petitioner's reporting which would have increased his taxabale income (and its concomitant failure to disclose to the jury that other errors in reporting, having the same effect, were also found as to each of those years), falls squarely within the parameters of *Giglio.* The created inference is that petitioner intentionally, rather than negligently, failed to report. It is clearly "likely" to ". . . have affected the judgment of the jury. . . ." Moreover, a showing of specific intent (willfulness) is not only material, but prerequisite, to establishment of the crime.

Accordingly, the decision below conflicts in principle with *Giglio* and the authority upon which it rests. It has deprived petitioner of due process and a fair trial.

(b) The decision below raises significant issues of fifth amendment due process and sixth amendment right to fair trial, recurring in the context of other criminal tax evasion prosecutions.

As noted above, prosecution for the crime tax evasion is the "capstone" of penalization for violation of the tax laws, and its utilization should be accompanied by only the highest standaard of due process and fair play. Nonetheless, the Government has admitted that it routinely singles out only one error, or less than all errors, for criminal prosecution.

> . . . It would have been plainly improper for Smith to start talking about his civil report, which was neither in evidence nor supported by other documents or testimony in evidence particularly where (*as is usually the case*) the tax deficiencies claimed for civil purposes were substantially higher than those for criminal purposes. . . . [Brief for Appellee, p. 9, *Wainwright v. United States* 448 Fed. 984 (10th Cir. 1971). Emphasis added.]

The Government's accepted practice as evidenced in the case at hand, is to ignore the required Constitutional standards in nearly all, if not all, prosecutions for attempted tax evasion.

The ramifications of the issues raised by the second question presented, therefore, also extend far beyond the immediate interests of the petitioner.

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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Appendix

FILED United States Court of Appeals Tenth Circuit August 17, 1971 Howard K. Phillips, Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY TERM, 1971

No. 560-70

ARCHIE L. WAINWRIGHT, *Petitioner-Appellant,*

v.

UNITED STATES OF AMERICA, *Respondent-Appellee.*

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Melvin A. Coffee (Robert D. Inman was with him on the brief) for Appellant.

Richard B. Buhrman (Johnnie M. Walters, Assistant Attorney General, Meyer Rothwacks and Joseph M. Howard, Department of Justice, and James L. Treece, United States Attorney, Of Counsel, were with him on the brief) for Appellee.

Before LEWIS, Chief Judge, BREITENSTEIN and BARRETT, Circuit Judges.

LEWIS, Chief Judge.

This case reaches us after denial by the trial court of a motion to vacate judgment under 28 U.S.C. § 2255. Appellant had been convicted of willfully attempting to evade federal income taxes for the years 1961-1963 and the judgment was affirmed by this court. United States v. Wainwright, 413 F_2 796, *cert. denied*, 396 U.S. 1009.

Appellant's primary post-conviction contention is that his conviction was based upon false and misleading testimony, known to the prosecution to be such, and thus leading to a constitutional infirmity. A brief statement of the facts is necessary to put this contention in proper perspective.

During the tax years in question, Wainwright owned and operated several gasoline stations. To supply these stations, he made large purchases of gasoline, paying the full purchase price monthly and receiving back from the supplier a discount or rebate check, the amount of which depended on the individual supplier and the volume of gasoline purchased. Wainwright failed to report a substantial amount of these rebates on his tax returns, and this omission was the sole element of the government's criminal case against him. It is undisputed, however, that the investigation of appellant's tax returns uncovered many other errors which were the basis of civil liability. Appellant contends that by failing to bring out these other errors at the criminal trial, the government painted a misleading picture before the jury. It is appellant's theory that if the jury knew the whole picture, i.e., that there were many mistakes on the tax returns, then it would more likely have considered the omission of the discounts to lack criminal intent.

The essence of appellant's objection is contained in the testimony of Revenue Agent Smith, who was asked:

Q. In summary then, Mr. Smith, for these three

> years the only adjustment that you made in Mr. Wainwright's tax returns which would increase his income were the adjustments of the result of the rebate discounts paid to him by the oil companies, is that correct.
>
> A. Yes.

Although appellant now claims that the agent's statement was completely false because admittedly other adjustments were made that would increase appellant's income, the argument has only superficial appeal. The agent's answer was clearly directed to the basis of the criminal charge, a complete failure to report income, and not to adjustments made through application of different accounting methods which resulted in increased taxable income and increased civil liability. The government had no duty to prove deficiencies not premising the criminal charge and, indeed, any such effort would be laced with potential prejudice. If, as is now contended, such further evidence would have benefited appellant that conclusion points only to misplaced trial strategy. The court below found that appellant's attorneys were knowledgeable in tax matters, were informed of and had access to the report showing the civil tax liability, and therefore knew or should have known about the "misstatement" by the government's witness.

Appellant also contends that the following instruction is constitutionally defective:

> Now whenever the facts appear beyond a reasonable doubt from the evidence in the case that the accused had signed his tax return, a jury may draw the inference and find that the accused had knowledge of the contents of the return.

A challenge to this instruction was rejected on direct appeal but appellant now calls to our attention a decision

of the Seventh Circuit, United States v. Bass, 425 F_2 161, which apparently interprets the instruction as creating a conclusive presumption contrary to constitutional safeguards pertaining to burden of proof. We must simply reiterate that we believe the instruction in this case to have been properly given and violative of no constitutional provision. *See* United States v. Wainwright, supra at 801-02.

Next, appellant urges that polygraph foundation evidence should have been allowed in the § 2255 hearing. Polygraph evidence was rejected at the criminal trial and this was upheld on direct appeal since proper foundation was not laid. Again appellant urges that he should have another chance to litigate this issue because of an intervening change in the law. He points to our opinion on direct appeal as the first indication that polygraph evidence might be admitted in this circuit. We give no comfort to appellant's interpretation of our earlier opinion in that regard and in any event appellant must present his case at the proper time. The original failure to establish a foundation appears to be an evidentiary problem already decided and not a constitutional question.

Finally, appellant argues that the government failed to prove the purchases involving the rebate discounts. This issue was also decided on appeal, but appellant contends that *In re* Winship, 397 U.S. 358, requires a reversal since the Supreme Court determined that every element of a crime must be proved beyond a reasonable doubt. This was done in the instant case. Appellant's conviction required only that he had attempted to evade a substantial amount of tax. *See* Swallow v. United States, 10 Cir., 307 F_2 81, *cert. denied*, 371 U.S. 950. There was evidence that a spot check of gasoline purchases was made, and this is sufficient.

AFFIRMED.

SEPTEMBER TERM — NOVEMBER 12, 1971

Before Honorable David T. Lewis, Chief Judge; and Honorable Jean S. Breitenstein and Honorable James E. Barrett, Circuit Judges.

No. 560-70

ARCHIE L. WAINWRIGHT, *Petitioner-Appellant,*

v.

UNITED STATES OF AMERICA, *Respondent-Appellee.*

Upon consideration of petition of appellant for rehearing, it is ordered that said petition be and is denied.